IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CHANCE RONALD COLLINS, Appellant.	)	2 CA-CR 2005-0102 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200201235

Honorable Stephen F. McCarville, Judge

AFFIRMED IN PART AND REMANDED IN PART WITH DIRECTIONS

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H O W A R D, Presiding Judge.

¶1 Appellant Chance Collins was indicted in October 2002 for his role in a riot in June of that year at the Pinal County Adult Detention Center. A jury found him guilty of two felonies, participation in a riot and criminal damage in excess of $10,000, and the

trial court sentenced him to concurrent prison terms of 15.75 and ten years. He raises three issues on appeal.

¶2 First, Collins contends the trial court "committed reversible error" in denying his pretrial motion to dismiss the charges and his alternative request for a jury instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), based on the state's inability to locate certain notes made during the riot. We review for an abuse of discretion a trial court's ruling on a motion to dismiss, *State v. Chavez*, 208 Ariz. 606, ¶ 2, 96 P.3d 1093, 1094 (App. 2004), as well as its decision to give or refuse a *Willits* instruction, *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995); *State v. Davis*, 205 Ariz. 174, ¶ 36, 68 P.3d 127, 133 (App. 2002). "We view the facts and evidence in the light most favorable to sustaining the trial court's ruling." *Chavez*, 208 Ariz. 606, ¶ 2, 96 P.3d at 1094.

¶3 The missing material in this case consisted of a logbook and some loose notes made by detention officers during the riot. At a pretrial evidentiary hearing on Collins's motion to dismiss, the trial court heard testimony from five witnesses—four employees of the Pinal County Sheriff's Office and an investigator at the Pinal County Attorney's Office. Corporal Juana Trejo testified that, at the request of Captain Brown, she had made entries during the riot in a blue logbook, a task originally begun by another detention officer, Daniel Fessenden.[1] Fessenden testified at trial that he had written the names of "eight or nine"

[1]Officer Fessenden did not testify at the evidentiary hearing on the motion to dismiss. In fact, the trial court expressed concern that Fessenden had not testified at the pretrial hearing, stating: "I'm not sure we even have lost notes from Officer Fesse[n]den at this point."

inmates he saw actively participating in the riot "so they would be dealt with later." Trejo's entries were primarily the names of persons coming and going from the unit. She testified that "[n]ot many" entries pertained to inmates' actions during the riot as observed by other detention officers and recorded by Trejo.

¶4 Trejo also testified she had seen one or two detention officers "writing something down on paper towels," and she had been given their loose notes when she took over the logbook from Fessenden. When the riot was over, Trejo gave the logbook and loose papers to Captain Brown. Brown, in turn, later gave them to Sergeant Keck, one of the primary riot investigators. Sometime during the next fifteen months, Keck discovered the logbook and papers were missing from his office.

¶5 Sergeant Keck testified that he viewed the detention officers' contemporaneous writings not as items of evidence but simply as notes of the sort typically used in preparing a formal report. Once incorporated into the final report, such notes often are not retained. Asked about a report he had prepared following his interview of Captain Brown nine days after the riot, Keck acknowledged it contained a substantive entry identifying ten inmates as instigators of the riot and naming two of the ten as having broken a television set. Collins was not among the ten inmates named.

¶6 It was the absence of his name in the missing documents that Collins deemed important, as evidence suggesting he had not participated in the riot. The trial court ruled that, "at best," the missing information "would have established that Mr. Collins' name was not mentioned" in the logbook, whose entries had been made for the purpose of

incriminating, not exculpating, the participants in the riot. The trial court further found no indication of bad faith in connection with "what appears to be a missing portion of the notes."

¶7 "Destruction or nonretention of evidence does not automatically entitle a defendant to a *Willits* instruction." *Murray*, 184 Ariz. at 33, 906 P.2d at 566. "Such an instruction is appropriate when a defendant proves that he was prejudiced by the state's loss or destruction of or failure to preserve material and reasonably accessible evidence that tended to exonerate him." *State v. Rosengren*, 199 Ariz. 112, ¶ 34, 14 P.3d 303, 313 (App. 2000); *see also State v. Atwood*, 171 Ariz. 576, 627, 832 P.2d 593, 644 (1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, ¶ 25, 25 P.3d 717, 729 (2001). Similarly, dismissal is not automatically required because evidence is lost. "Under such circumstances, due process is violated only if a defendant shows the state had acted in bad faith in failing to preserve the evidence." *State v. O'Dell*, 202 Ariz. 453, ¶ 12, 46 P.3d 1074, 1078 (App. 2002). Establishing bad faith in turn requires proof that the state's agents knew the exculpatory value of the material when it was lost or destroyed. *Id.* If there exists only a possibility that the evidence might be exculpatory, that possibility "is insufficient to establish a due process violation, as there has been no showing of prejudice to the defendant." *Id.* ¶ 13.

¶8 We find no abuse of the trial court's discretion in denying Collins's motion to dismiss the charges. The record supports its finding at the evidentiary hearing that there was no evidence of bad faith surrounding the state's inability to locate the missing material.

Indeed, during the settling of instructions at the close of evidence, defense counsel conceded the defense had been unable to show bad faith and had established only that "there was material evidence on there in those notes that *may have exonerated* Mr. Collins and the State has lost it without any reasonable explanation." (Emphasis added.) *See State v. Youngblood*, 173 Ariz. 502, 508, 844 P.2d 1152, 1158 (1993) (absent bad faith, failure to preserve evidence "which might have exonerated" defendant does not violate due process). Although Collins argues in his reply brief that bad faith should be presumed, based on what he alleges to have been the "[o]bvious[]" substitution of one logbook for another, he has cited no authority in support of his contention.

¶9 Also during the settling of instructions, the trial court denied Collins's renewed request for a *Willits* instruction, finding he had not shown prejudice. Because the missing notes and logbook entries were not clearly exculpatory but only potentially helpful, at best, by virtue of omitting Collins's name, Collins was not entitled to a *Willits* instruction unless he could show prejudice flowing from the lack of the writings themselves. *See State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999); *State v. Dunlap*, 187 Ariz. 441, 463-64, 930 P.2d 518, 540-41 (App. 1996). But, as the trial court correctly observed, the trial testimony of Officer Fessenden and Sergeant Keck had already apprised the jury that Collins was not named in the missing notes.

¶10 Officer Fessenden testified that he personally had not seen Collins break anything during the riot. Sergeant Keck confirmed that the report he had prepared based on the now-missing logbook and notes contained names of inmates allegedly involved in the riot

and that Collins's name was not among them. Hence, the court stated, "the defense already presented at least two witnesses to support their argument that his name was not included in a list or log. So again, there's been no prejudice to the defendant. You can certainly argue that to the jury."

¶11 We agree that Collins was not prejudiced by the state's inability to produce the logbook and notes from which Sergeant Keck had prepared his written report. The report contained "excerpts" from the missing logbook, including the entry naming ten inmates who had allegedly participated in the riot and omitting Collins's name. Not only was the information Collins wanted from the missing documents thus already in evidence, but it was not directly exculpatory in any event. Although the presence of his name among a contemporaneously compiled list of riot participants would have been inculpatory, the converse was not true: the absence of his name from notes made by some witnesses to the riot could not prove Collins had not been involved in it.

¶12 In fact, two other witnesses, detention officers Santos and Glass, both testified that they had seen Collins participating actively in the riot, tearing a telephone off a wall, and attempting to damage other property. Glass was present when the riot began, and Santos arrived on the scene within moments. Both had known Collins by name before that day, and both were certain of their identifications of Collins as one of the riot participants. In addition, a third officer testified that, after the riot was over and the inmates were all restrained, she heard Collins—in handcuffs and leg chains, lying on the ground—saying boastfully, "We got it, we did it."

¶13 At most, the absence of Collins's name from the missing logbook would merely have corroborated, while adding little to, the testimony of Officer Fessenden and the other witnesses who had not seen Collins participating in the riot. Because the jury was told the missing notes and logbook entries did not name Collins, there is no reason to believe that looking at the writings themselves would have had any effect on how the jury resolved the conflict between the testimony of those witnesses who had personally seen Collins participating in the riot and those who said they had not. The trial court did not abuse its discretion in refusing to give a *Willits* instruction.

¶14 In his second issue on appeal, Collins contends he was denied due process by the admission at trial of allegedly perjured testimony by detention officers Glass and Santos. Collins's assertion of perjury rests on perceived discrepancies between the officers' testimony at his trial and in the earlier prosecution of another inmate, Matthew Manzanedo. Collins did not raise the claim below, thereby forfeiting his right to relief unless he can show that fundamental error occurred and prejudice resulted.[2] *See State v. Martinez*, 210 Ariz. 578, n.2, 115 P.3d 618, 620 n.2, *cert. denied*, ___ U.S. ___, 126 S. Ct. 762 (2005); *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

[2]In his reply brief, Collins mistakenly asserts that he "did not have access to the transcripts in the Manzanedo case at the time of his trial. It was only because Appellate counsel represented Manzanedo on his appeal that discrepancies between the trial testimony of the State's witnesses were uncovered." Yet trial transcripts from *State v. Manzanedo* were marked as exhibits 3 and 10 at Collins's trial and used by defense counsel in attempting to impeach both Santos and Glass.

¶15 We conclude no error—much less fundamental error—has been shown. Discrepancies in a witness's testimony given on different occasions many months apart and several years after the incident itself do not necessarily reflect perjury. *See State v. Dalglish*, 131 Ariz. 133, 139, 639 P.2d 323, 329 (1982) ("[I]nconsistencies can be expected as the time between the crime and the trial lengthens."); *State v. Brazil*, 18 Ariz. App. 545, 546, 504 P.2d 76, 77 (1972) (despite "many inconsistencies" in witness's testimony at preliminary hearing, trial, and evidentiary hearing on motion for new trial, nature of inconsistencies did not evince perjury). And, unless a witness has clearly committed perjury, a defendant is not entitled to a new trial on such grounds. *State v. Morrow*, 111 Ariz. 268, 271, 528 P.2d 612, 615 (1974).

¶16 Instead, "inconsistencies in witness testimony go . . . to the credibility of the witnesses and the weight to be accorded to the evidence, which are issues for the jury to resolve." *State v. Rivera*, 210 Ariz. 188, ¶ 20, 109 P.3d 83, 87 (2005); *see also State v. Roberts*, 139 Ariz. 117, 121, 677 P.2d 280, 284 (App. 1983) ("Credibility . . . is a matter for the jury."). Discrepancies in testimony are a proper subject for cross-examination and impeachment and, ultimately, are for the jury to weigh and resolve. *See generally State v. Manzanedo*, 210 Ariz. 292, ¶ 3, 110 P.3d 1026, 1027 (App. 2005) ("That other witnesses testified they had not seen Manzanedo damage any property does not render Officer Glass's testimony insubstantial . . . . The jury was entitled to believe whichever witnesses it found credible.").

¶17 Here, defense counsel cross-examined both officers Santos and Glass at length about their prior statements and testimony. Collins acknowledges "the jury did hear the witness impeachment and had the opportunity to evaluate witness credibility," but he asks us to disregard its conclusion and "re-weigh credibility." We decline to do so. *See State v. Long*, 121 Ariz. 280, 281, 589 P.2d 1312, 1313 (1979) ("[W]e do not perform as a second-echelon jury and reweigh the evidence to decide whether we would reach the same conclusion as the trier-of-fact."). We agree with the state that the various internal discrepancies in the officers' testimony did not rise to the level of perjury, and we find no fundamental error.

¶18 In his final argument, Collins contends the trial court erred by enhancing his sentences on the basis of prior felony convictions as to which he was afforded neither a bench trial nor the protections of Rule 17.6, Ariz. R. Crim. P., 16A A.R.S., before he admitted the existence of the convictions at sentencing. "We review *de novo* whether the trial court properly accepted [such] admissions." *State v. Anderson*, 199 Ariz. 187, ¶ 35, 16 P.3d 214, 221 (App. 2000).

¶19 Rule 17.6 provides: "Whenever a prior conviction is charged, an admission thereto by the defendant shall be accepted only under the procedures of this rule, unless admitted by the defendant while testifying on the stand." Collins did not testify at trial. At sentencing, defense counsel agreed with the prosecutor's statement to the court that Collins intended to admit having two prior felony convictions. After confirming which two convictions they were and that Collins had previously pled guilty in both cases, the trial

court asked Collins: "All right. You acknowledge that those are two valid prior felony convictions for which you either were found guilty or had pled guilty with the service of an attorney in each of the two matters; is that correct?" Collins replied affirmatively.

¶20 In *State v. Gillies*, 135 Ariz. 500, 507, 662 P.2d 1007, 1014 (1983), the defendant likewise had not testified at trial, and the trial court similarly failed to comply with the requirements of Rules 17.2 and 17.3 before accepting the defendant's admission of a prior conviction. Our supreme court stated: "The remedy for this error is to remand for a resentencing hearing where the state must either prove the prior conviction or the mandates of rule 17.6 must be followed in accepting the admission." 135 Ariz. at 507, 662 P.2d at 1014; *accord Anderson*, 199 Ariz. 187, ¶ 37, 16 P.3d at 221; *State v. Medrano-Barraza*, 190 Ariz. 472, 474-75, 949 P.2d 561, 563-64 (App. 1997); *State v. Stuart*, 168 Ariz. 83, 87-88, 811 P.2d 335, 339-40 (App. 1990); *State v. Nieto*, 118 Ariz. 603, 609, 578 P.2d 1032, 1038 (App. 1978).

¶21 The defendant in *Anderson*, after being found guilty by a jury, admitted having multiple prior felony convictions for sentence-enhancement purposes. The procedure the trial court followed there mirrored that utilized here: the court informed the defendant of the nature of the alleged prior convictions but failed to inform him of either the effect that admitting the allegations would have on his sentence or his right to have the state prove the allegations at a trial. The appellate court therefore remanded the case to the trial court "for a hearing to determine whether defendant knew from any source the rights he was giving up and the consequences of his admissions." *Anderson*, 199 Ariz. 187, ¶ 37, 16 P.3d at 221.

Further, the court held, "[i]f the trial court determines defendant did not know the effect of his admissions, defendant should be permitted to withdraw his admissions and require the State to prove the allegations." *Id.; accord Stuart*, 168 Ariz. at 87-88, 811 P.2d at 339-40.

¶22 The state contends that Collins forfeited his right to appellate review of this issue, absent fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. And, it claims, in a fundamental error review, Collins would have the burden of showing fundamental error and prejudice. *See id.* ¶ 20. Although this case would seem appropriate for a fundamental error analysis, the supreme court in *Gillies* specified the remedy for failure to follow the proper procedure when the defendant admits a prior conviction for sentencing purposes. Subsequent cases have not expressly or impliedly overruled *Gillies*, and we are bound to comply with it. *See State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003) (court of appeals may not ignore supreme court opinion).

¶23 The state further contends that any claims relating to alleged violations of Rule 17.6 should only be raised in post-conviction relief proceedings under Rule 32, Ariz. R. Crim. P., 17 A.R.S. We find no authority for this proposition. Neither Rule 17, Rule 31, nor Rule 32, Ariz. R. Crim. P., precludes such claims from being raised on direct appeal. And, again, in *Gillies*, the supreme court considered the issue on direct appeal.

¶24 Finally, the state notes that the supreme court granted review on the issue of the application of Rule 17.6 to a defendant's stipulation to a prior conviction in *State v. Morales*, No. CR-06-0374-PR. But we are not at liberty to anticipate how the court will rule. *See State v. Keith*, 211 Ariz. 436, ¶ 3, 122 P.3d 229, 230 (App. 2005).

¶25 Because Collins's admissions, like the defendants' in *Gillies*, *Anderson*, and *Stuart*, "were apparently taken in violation of Rule 17," *Stuart*, 168 Ariz. at 87, 811 P.2d at 339, we remand this matter to the trial court. *See Gillies*, 135 Ariz. at 507, 662 P.2d at 1014. We direct the court to conduct a hearing to determine whether, before admitting the existence of his prior convictions, Collins knew from any source "that he was waiving his right to confront witnesses and his right to remain silent," *Medrano-Barraza*, 190 Ariz. at 474, 949 P.2d at 563, and what the sentencing consequences of his admissions could be. If Collins knew, from any source, the rights he was forgoing and the consequences of his admissions, his sentences are affirmed. If the trial court determines he lacked that knowledge at sentencing, it shall allow Collins to withdraw his admissions and require the state to prove that he has prior convictions.

¶26 We affirm Collins's convictions but remand the case for further proceedings consistent with this decision.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, Judge